A

Edwin bin Ajin v Public Prosecutor

B

HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO SDK-42H(A)-1/1 OF 2018
CELESTINA STUEL GALID J
8 NOVEMBER 2019

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 17(a) of the Malaysian Anti-Corruption Commission Act — Appellant charged under s 17(a) of the Malaysian Anti-Corruption Commission Act — Whether sessions court correct in rejecting alibi — Whether alibi complied with requirements of s 402A of Criminal Procedure Code — Whether defence of alibi raised reasonable doubt in prosecution's case — Criminal Procedure Code s 402A

D

The appellant ('accused') was charged with one count under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009. The accused who was working as a 'pembantu pendaftaran' with Jabatan Pendaftaran Negara, Telupid had called PW1, alleging that PW1 and the complainant, PW2 were to be arrested by the police for being involved in validation of PW2's alleged fake identity card. The accused also asked for PW2 to pay RM5,000 to settle the case. Subsequently, PW1, PW2 and PW3 met up with the accused. PW2 and PW3 thereafter went to Sandakan and stayed at a hotel named Paris Inn. PW2 and PW3 then went to RHB Bank at Sandakan and withdrew the money. The accused accompanied PW2 and PW3 to their hotel room but half way up, he asked to be given the money, put it in his pocket and left. PW2 lodged a report with MACC Sandakan against the accused when PW2 and PW3 found out that contrary to what the accused had told them, the identity card was genuine. The accused had pursuant to s 402A of the Criminal Procedure Code submitted an alibi to the public prosecutor prior to the commencement of the trial. The sessions court rejected the alibi and found the accused guilty of the charge and sentenced him to 18 years imprisonment and a fine of RM25,000 and in default of payment of fine, six months imprisonment. Hence, this appeal against conviction and sentence.

E

F

G

H

Held, setting aside the conviction and sentence by the sessions court; and acquitting and discharging the accused:

I

(1) There was no finding by the sessions court that DW2 was not a creditworthy witness. The evidence of the accused that he could not had been at the date, time and place as per the charge was not challenged in cross-examination and hence the evidence was deemed accepted. No

prosecution witness testified to the effect that it refuted the alibi of the accused. It was therefore difficult for the court to reconcile the fact that the accused was supposedly to have been at Paris Inn Hotel, Sandakan at 11.30am to commit the offence and within 45 minutes later, at DW2's clinic at Telupid, some 130km away (see paras 31 & 33–35).

(2) The accused showed that near the time the crime was committed, he was at a distance from the place it was committed through the evidence by DW2 whose evidence was accepted by the sessions court. Any reliance on exh P14 would not have held water against the unchallenged evidence by DW2. In short, the discrepancies in exhs P14 and P15 did not diminish the alibi of the accused which was corroborated by DW2's evidence. Therefore, the accused had discharged the burden of proving his alibi on a balance of probabilities and as such, successfully raised reasonable doubt to the prosecution's case (see paras 38, 41–42 & 46).

[Bahasa Malaysia summary

Perayu ('tertuduh') didakwa dengan satu tuduhan di bawah s 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009. Tertuduh yang bekerja sebagai pembantu pendaftaran dengan Jabatan Pendaftaran Negara, Telupid telah memanggil PW1, mendakwa bahawa PW1 dan pengadu, PW2 akan ditangkap oleh polis kerana terlibat dalam pengesahan kad pengenalan palsu PW2. Tertuduh juga meminta PW2 membayar RM5,000 untuk menyelesaikan kes tersebut. Selepas itu, PW1, PW2 dan PW3 bertemu dengan tertuduh. PW2 dan PW3 selepas itu pergi ke Sandakan dan menginap di sebuah hotel bernama Paris Inn. PW2 dan PW3 kemudian pergi ke Bank RHB di Sandakan dan mengeluarkan wang tersebut. Tertuduh mengiringi PW2 dan PW3 ke bilik hotel mereka tetapi separuh perjalanan, dia meminta diberikan wang itu, memasukkannya ke dalam poket dan pergi. PW2 membuat laporan kepada SPRM Sandakan terhadap tertuduh ketika PW2 dan PW3 mendapati bahawa bertentangan dengan apa yang diberitahu oleh tertuduh, kad pengenalan itu adalah sah. Tertuduh telah menurut s 402A Kanun Tatacara Jenayah telah menyerahkan alibi kepada pendakwa raya sebelum bermulanya perbicaraan. Mahkamah sesyen menolak alibi dan mendapati tertuduh bersalah atas tuduhan tersebut dan menjatuhkan hukuman penjara 18 tahun dan denda RM25,000 dan jika gagal membayar denda, penjara enam bulan. Oleh itu, rayuan ini terhadap sabitan dan hukuman.

Diputuskan, mengetepikan sabitan dan hukuman oleh mahkamah sesyen; dan membebaskan dan melepaskan tertuduh:

(1) Tidak ada penemuan oleh mahkamah sesyen bahawa DW2 bukan saksi yang boleh dipercayai. Keterangan tertuduh bahawa dia tidak mungkin pada tarikh, waktu dan tempat seperti pertuduhan itu tidak ditentang dalam pemeriksaan balas dan oleh itu keterangan tersebut dianggap diterima. Tiada saksi pendakwaan memberi keterangan yang

menyangkal alibi tertuduh. Oleh itu, sukar bagi mahkamah untuk menerima fakta bahawa tertuduh sepatutnya berada di Paris Inn Hotel, Sandakan pada pukul 11.30 pagi untuk melakukan kesalahan itu dan dalam masa 45 minit kemudian, berada di klinik DW2 di Telupid, sekitar 130km jauhnya (lihat perenggan 31 & 33–35).

(2) Tertuduh menunjukkan bahawa pada waktu kesalahan itu dilakukan, dia berada jauh dari tempat ia dilakukan melalui keterangan oleh DW2 yang mana keterangan diterima oleh mahkamah sesyen. Sebarang pergantungan pada eksh P14 tidak akan dapat dibuktikan dengan keterangan yang tidak dicabar oleh DW2. Ringkasnya, percanggahan dalam ekshs P14 dan P15 tidak mengurangi alibi tertuduh yang disokong oleh keterangan DW2. Oleh itu, tertuduh telah melepaskan beban membuktikan alibinya dengan imbangan kebarangkalian dan dengan demikian, berjaya menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 38, 41–42 & 46).]

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523; [2013] 5 MLRA 661, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 2 CLJ 402, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code ss 316, 402A, 402A(1), (2)
Evidence Act 1950 s 11, Illustration (a)
Malaysian Anti-Corruption Commission Act 2009 ss 17(a), 24
Penal Code s 420

Dennis Rantau (Dennis Rantau & Co) for the appellant.
Rozana Abdul Hadi (MACC) for the respondent.

Celestina Stuel Galid J:

INTRODUCTION

[1] The parties shall herein be referred to as they were in the court below.

[2] The accused was charged with one count under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') or alternatively, under s 420 of the Penal Code for cheating.

[3] After a full trial, the Sessions court found him guilty of the charge under s 17(a) of the Act and sentenced him under s 24 of the Act to 18 years imprisonment and a fine of RM25,000 and in default of payment of fine, six months imprisonment.

[4] The accused appealed to this court against conviction and sentence.

THE CHARGE

[5] The charge reads as follows:

> Bahawa kamu pada 26.10.2010, jam lebih kurang 11.30 pagi di Hotel Paris Inn, Lot 4B, Blok 23, Jalan Leboh 3, Bandaran Sandakan, dalam Negeri Sabah, sebagai seorang ejen kepada Jabatan Pendaftaran Negara Telupid (JPN) berpangkat Pembantu Pendaftaran Gred KP22 telah secara rasuah memperoleh untuk diri kamu satu suapan iaitu wang tunai RM5,000.00 daripada Jamail bin Sungah melalui Catherine @ Sarimah binti Enggoh sebagai dorongan bagi melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu iaitu untuk kononnya tidak mengambil tindakan ke atas Jamail bin Sungah yang dikatakan mempunyai kad pengenalan yang palsu dan James Kosou yang dikatakan terlibat dalam pengesahan kad pengenalan palsu Jamail bin Sungah dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seskyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum di bawah Seksyen 24 Akta yang sama.

THE PROSECUTION'S CASE

[6] It was the prosecution's case that the accused who was working as a *Pembantu Pendaftaran KP22* with Jabatan Pendaftaran Negara ('JPN'), Telupid had on 20 October 2010 at about 3pm called PW1, alleging that PW1 and the complainant, PW2 were to be arrested by the police for being involved in validation of PW2's alleged fake identity card. The accused also asked for PW2 to pay RM5,000 to settle the case. PW1 conveyed these to PW2.

[7] On 24 October 2010, the accused further called PW1 to meet up with him the following day in Telupid town to 'settle' the issue of PW2's identity

card. PW1, PW2 and PW3 did meet up with the accused the next day wherein the accused took PW2's identity card and birth certificate. He told them that the documents were fake and that the case could be 'settled' with a payment of RM5,000 to the accused.

[8] As PW2 did not have the money on him that day, he said he needed to have his son deliver his bank account book before withdrawing the money from his bank account in Sandakan. PW2 and PW3 thereafter went to Sandakan and stayed at a hotel named Paris Inn.

[9] On 26 October 2010, PW2 and PW3 went to RHB Bank at Batu 4, Sandakan and withdrew RM5,000 in RM50.00 denomination. The accused contacted PW2 and PW3 by telephone and asked them to wait for him nearby Hospital Duchess of Kent, Sandakan but upon meeting them there, decided to send them to the hotel using his car instead.

[10] The accused accompanied PW2 and PW3 to their hotel room but half way up, he asked to be given the money, put it in his pocket and left.

[11] On 27 October 2010, the accused called PW1 and informed him to bring PW2 and PW3 to JPN Telupid to meet up with him wherein the accused instructed PW2 and PW3 to sign two pieces of paper which contents stated that PW2 was a resident of Kg Minusoh. The accused informed PW2 that his birth certificate would be returned in three months' time.

[12] On 8 November 2010, PW2 and PW3 went to JPN Kota Kinabalu to verify PW2's identity card and found out that contrary to what the accused had told them, it was genuine.

[13] On 26 November 2010, PW2 lodged a report with MACC Sandakan against the accused.

THE ALIBI

[14] The accused had pursuant to s 402A of the Criminal Procedure Code ('the CPC') submitted an alibi to the public prosecutor prior to the commencement of the trial. The alibi was tendered in court through PW16 and marked as exh 'D2'.

[15] The alibi in part reads as follows:

> Dimaklumkan bahawa tertuduh akan mengemukakan pembelaan alibi dalam perbicaraan dan dengan ini memberi notis secara bertulis bahawa pada 26/10/2010 jam lebih kurang 11.30pagi sepertimana yang dikatakan dalam pertuduhan

alternatif, tertuduh sedang membawa keretanya dalam perjalanan dari Sandakan ke Pekan Telupid dan selepas sampai di Telupid, Edwin Ajin telah berjumpa dengan Dr Mahen di kliniknya dan kemudiannya ke pejabat di Pejabat Pendaftaran Negara Daerah Telupid.

[16] The alibi witnesses were listed as the accused, one Dr Mahendra Kalesamy of Klinik Dr Mahen, Telupid and one Suriadah bt Tung Nasip of Pejabat Pendaftaran Negara, Telupid.

THE REJECTION OF THE ALIBI

[17] The learned sessions court judge referred to s 402A of the CPC and noted that the alibi complied with sub-s (1) of the said provision.

[18] However, as regards sub-s (2), the learned sessions court judge found that the alibi did not comply with the requirement as there was no further specificity provided regarding the whereabouts of the accused at 11.30am save for to state that approximately 11.30am on 26 October 2010, the accused was driving his vehicle somewhere from Sandakan to Telupid.

[19] The learned sessions court judge also found the alibi to be defective as there were discrepancies between the alibi and the evidence led during the trial namely the accused' claim form for the month of October 2010 (exh 'P14') which stated that the accused was in Sandakan from 7am–7pm on that day and his punch card which showed that the asccused was supposedly in the office from 7.38am–5pm on the same day (exh 'P15').

[20] The accused appealed against the conviction and sentence, inter alia, on the rejection by the sessions court of the alibi, on the following grounds (verbatim):

> 2.8 The leamed Sessions Court Judge had erred in law and in facts to convict the accused-appellant on the alternative charge when a reasonable doubt in the respondent's case;
>
> ...
>
> 2.11 The learned Session Court Judge erred in law and in facts in inferring that the evidence of PW6 who was an independent witness supported the evidence of the prosecution's evidence and negative the alibi evidence of the accused-appellant when in fact, PW6's evidence only confirmed PW2 withdrew RM5,000/- from him;
>
> ...
>
> 2.18 The learned Sessions Court Judge had erred in law and in facts in failing to evaluate fairly the defence of alibi in raising a reasonable doubt in the respondent's case;

...

2.24 The learned Sessions Court Judge had erred in law and in facts in finding that the particulars in the notice of alibi without specifying the place where the accused-appellant was at 11.30am on 26/10/2010 was deemed not compliance of section 402A(2) of the Criminal Procedure Code when the learned Sessions Court Judge had failed to consider the accused-appellant's evidence that he was driving alone in his car all along his return journey from Sandakan to Telupid;

2.25 The learned Sessions Court Judge had erred in law and in facts in finding to consider the written evidence of the accused-appellant that at 11.30am the accused-appellant was at Sapi Nangoh or area beyond that basing on the length of time calculated between Sandakan and Pekan Telupid when the learned Sessions Court Judge deemed defective for non-compliance of section 402A(2) CPC;

2.26 The learned Sessions Court Judge had erred in law and in facts in failing to consider the accused-appellant's written evidence as a whole and particularly paragraph 9 of the said written statement when finding that the accused-appellant had failed to comply strictly with section 402A(2) of the CPC.

THIS COURT'S DECISION

The law

[21] Section 402A of the CPC provides as follows:

(1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.

(2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.

(3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions:

(a) the accused has given a written notice of the alibi to the Public Prosecutor; and

(b) the Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

(4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[22] In *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692, the Federal Court had the occasion to restate the legal principles applicable to the defence of alibi, stating as follows:

A [92] Now, the following legal principles on the defence of alibi are relevant in the present namely:

(i) 'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see: *Regina v Youssef* (1990) 50 A Crim R 1 at pp 2–3);

B

(ii) the correct 'approach to be adopted in regard to an alibi defence, … is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt' (see: *Leve v S (CA & R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa) (Emphasis added.);

C

D

(iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true'. (See: *R v Hlongwane* 1959 (3) SA 337);

E

(iv) '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false' (see: *S v Liebenberg* 2005 (2) SACR 355 (SCA). (Emphasis added.);

F

(v) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime' (see: *Mutachi Stephen v Uganda*. The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see: *Lizotte v The King, 1950 Can LII 48 (SCC),* [1951] SCR 115); and

G

H

(vi) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see: *R v Letourneau* [1994] BCJ No 265 (QL) (CA), 61).

Was the sessions court correct in rejecting the alibi?

I

[23] It was submitted by the learned deputy public prosecutor ('DPP') that the learned sessions court judge did not err in rejecting the alibi as the accused had failed to state the name of the person or persons who was his alibi witness specifically for the statement by the accused that he was 'sedang membawa

keretanya dalam perjalanan' (or at the time of the offence, was driving his car and was on the way). The learned DPP also took exception to the inclusion of DW2 (Dr Mahendra Kalesamy) as an alibi witness as it was contended that DW2 stated in evidence that the accused had seen him at 12.15pm on 26 October 2010 by merely in referring to his notes (exh 'D4'). However, the commission of the offence for which the accused was charged was not at 12.15pm, it was at 11.30am.

[24] In short, the contention of the learned DPP was that the alibi of the accused did not explain his whereabouts at 11.30am on 26 October 2010. Thus, it was further contended that the accused had not discharged the burden of proving his alibi.

[25] The relevant question is this — must the alibi pinpoint to a tee, where and with whom the accused was at the exact time of the alleged commission of the offence per the charge? This, bearing in mind that the standard of proof to be discharged by the accused in establishing his alibi defence is only on the balance of probabilities — see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10.

[26] I did not find it to be so.

[27] Firstly, it was not in dispute that the alleged commission of the offence was at 11.30am on 26 October 2010 at Paris Inn Hotel, Sandakan. Of significance was the fact that the charge was never amended in any way. This, despite the learned sessions court judge making the following observation:

> ... I do not agree with the defence proposition that it was unlikely for the accused to be on the crime scene at the time and date stated in the charge. At most, the argument was only relevant to the time stated in the charge but not the date and commission of the crime stated.

(see para [70] of the grounds of judgment at p 44 of the record of appeal (ROA) Vol 1).

[28] Secondly, DW2 testified that the accused was a patient of his and produced his case note on the accused's medical history (exh 'D4'). This included information such as the dates and times of his examinations of the accused. Based on exh 'D4', DW2 was able to state that he had seen the accused on 26 October 2010 at 12.15pm. He said:

> DW2: Seterusnya pada 26.10.2010, 12.15 pm itulah waktu dia hadir untuk pemeriksaan dan saya dapati pemeriksaan tekanan darah 130/90, masih ada komplen sedikit pening. Dengan itu saya suruh dia kembali pada keesokan harinya untuk pemeriksaan kembali samada masih dia perlu diberi ubat darah tinggi ataupun tidak.

(see line 441 of the notes of proceeding ('NOP') at p 419 of the ROA Vol 3).

[29] DW2's above evidence was not challenged at all by the learned DPP save for to suggest that with the blood pressure reading as such, the accused could not have driven from Telupid to Sandakan and back to Telupid (see line 580 of the NOP at p 427 of the ROA Vol 3). DW2 answered that the accused could not and was not allowed to (see line 581 of the NOP at p 427 of the ROA Vol 3).

[30] In fact, save for to also suggest that DW2 had a close relationship with the accused and that his wife had some family relations with either the accused or his wife (thereby perhaps insinuating that DW2's evidence was suspect), there was no suggestion by the prosecution that DW2 was not telling the truth when giving his testimony.

[31] In any event, there was no finding by the sessions court that DW2 was not a creditworthy witness. On the contrary, the learned sessions court judge did in fact accept DW2's testimony above, stating that 'the alibi notice is corroborated by the testimony of DW2' (see para 70 of the grounds of judgment at p 46 of the ROA Vol 1).

[32] The accused (DW1) had through his witness statement testified as follows:

> 7. ... Rekod pesakit saya di Klinik Dr Mahen Pekan Telupid telah jelas menyatakan saya ada di klinik tersebut berjumpa dengan Dr Mahen pada jam 12.15pm dan adalah tidak mungkin bagi saya berada di Hotel Paris Inn, Bandar Sandakan pada jam 11.30am kerana masa yang diperlukan untuk saya bertolak dari situ ke Pekan Telupid dengan memandu kereta jauh lebih daripada 45 minit.
>
> 8. Secara terperinci saya merujuk kepada rekod pesakit saya di Klinik Dr Mahen [dikemukakan sebagai eksibit D]. Mengikut rekod pesakit saya di Klinik Dr Mahen, Pekan Telupid, saya telah menghadiri temujanji tersebut pada jam 12.15pm. Oleh itu, adalah mustahil bagi saya untuk berada di Hotel Paris Inn, Bandar Sandakan pada jam lebih kurang 11.30 dan kemudian berada di Klinik Dr Mahen pada jam 12.15pm kerana jarak antara dua tempat adalah lebih kurang 130km.
>
> 9. Dengan memandu kereta dari Bandar Sandakan ke Pekan Telupid dalam kelajuan biasa dan ambil kira keadaan trafik yang tidak sibuk, masa yang diperlukan adalah lebih kurang 2 jam dan dalam masa 45 minit memang tidak boleh sampai di Pekan Telupid. Oleh itu, saya tidak mungkin berada di Hotel Paris Inn, Bandar Sandakan pada 26.10.2010 jam lebih kurang pukul 11.30 pagi.

[33] It is relevant to note that the evidence of the accused above that he could not have been at the date, time and place as per the charge was not challenged in cross-examination. The case law is settled on the effect of such failure — the

evidence is deemed accepted (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154).

[34] Bearing in mind that the alibi notice was found to have been properly given and that the primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before the trial of making such investigations as they think fit — see *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 2 CLJ 402, it would have been opened for the prosecution to have called witnesses to refute the alibi of the accused. However, no prosecution witness testified to the effect that it was in fact possible for one to have driven from Paris Inn Hotel, Sandakan at 11.30am and reach Klinik Dr Mahen at Telupid which was some 130km away by 12.15pm on the same day.

[35] It was therefore difficult for this court to reconcile the fact that the accused was supposedly to have been at Paris Inn Hotel at Sandakan at 11.30am on 26 October 2010 to commit the offence and within 45 minutes later, at DW2's clinic at Telupid, some 130km away.

[36] As for the insistence by the learned sessions court judge for 'specificity', I need only refer to the Federal Court case of *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 which referred to s 11 of the Evidence Act 1950 in dealing with the defence of alibi, stating that:

> [36] In Malaysia this plea of alibi, which is more a rule of evidence rather than a defence in the normal sense, together with the burden placed on the person who asserts that he was elsewhere, can be found in the Evidence Act 1950. *Section 11 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Under illustration (a), whether A committed a crime on a certain day and the fact that he was somewhere else, is relevant. Therefore if an accused person, in this case the first respondent, states that he was somewhere else ie, he was not at the scene of crime that inconsistent fact is relevant. If successful in establishing his alibi his acquittal should be assured as he could not have committed a crime when he was physically away from the scene of crime.* (Emphasis added.)

[37] Illustration (a) to s 11 of the Evidence Act 1950 is reproduced below:

> Facts not otherwise relevant are relevant —
>
> (a) if they are inconsistent with any fact in issue or relevant fact;
>
> (b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

ILLUSTRATIONS

(a) The question is whether A committed a crime at Kuala Lumpur on a certain day.
The fact that on that day A was at Taiping is relevant.

The fact that *near the time* when the crime was committed A *was at a distance from the place where it was committed*, which would render it highly improbable, though not impossible, that he committed it is relevant. (Emphasis added.)

[38] The above illustration clearly does not envisage that the party relying on an alibi must be able to specify to a tee his whereabouts in order for the alibi to be acceptable. It suffices that he is able to show that *near the time* the crime was committed, he was *at a distance* from the place it was committed. In the present case, the accused had done so through the evidence by DW2 whose evidence was accepted by the sessions court.

[39] The sessions court had also rejected the alibi on the ground that there were discrepancies with the accused claim form for the month of October 2010 (exh 'P14') which stated that the accused was in Sandakan from 7am–7pm on 26 October 2010 and his punch card which showed that the accused was supposedly in the office from 7.38am–5pm on the same day (exh 'P15').

[40] It has to be noted that the accused did not rely on these two exhibits in relation to his alibi defence. It was the prosecution who had the exhibits tendered. However, little weight could be attached to either one of the said exhibits as they were contradictory with each other in that exh 'P14' placed the accused in Sandakan (only) but on the other hand, exh 'P15' placed the accused in Telupid (only) around the same time on 26 October 2010.

[41] Thus, any reliance on exh 'P14' to contend that the accused was indeed in Sandakan the whole day on 26 October 2010 (in order to commit the offence at 11.30am) would not have held water against the unchallenged evidence by DW2 that the accused was in his clinic at Telupid at 12.15pm. Likewise, exh 'P15' could not be relied on by the prosecution too as it removed any possibility of the accused being in Sandakan during the alleged commission of the offence.

[42] In short, the discrepancies in exhs 'P14' and 'P15' did not diminish the alibi of the accused which was corroborated by DW2's evidence.

[43] Respectfully, when the learned sessions court judge found that the alibi notice was corroborated by the testimony of DW2, it was incumbent upon the learned sessions court judge to have considered whether it was therefore

possible (or how it was possible) for the accused to have committed the offence as per the charge. However, none of this was discussed in the sessions court's grounds of judgment.

[44] Such failure to my mind opened the door for this court's appellate interference as laid down by decided cases, for instance, the Court of Appeal case of *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523; [2013] 5 MLRA 661 where the court stated that:

> [13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is de novo review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163); *Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:
>
> (a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept;
>
> (b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account, of failed to take into account some matter which he or she ought to have taken into account; or
>
> (c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or
>
> (d) in so far aside the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.
>
> [14] What, then is the appropriate standard of review for the appellate court to apply in mixed question of fact and law. In our view the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding.

[45] It is provided under s 316 of the CPC that:

A At the hearing of the appeal the Judge may if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —

(a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;

B

(b) in an appeal from a conviction or in an appeal to sentence —

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or

C

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(iii) in an appeal from any other order, alter or reverse such order.

D **[46]** The effect of having successfully raised an alibi is that the accused is assured of his acquittal (see *Public Prosecutor v Azilah bin Hadri & Anor*). For the reasons discussed above, this court was of the view that the accused had discharged the burden of proving his alibi on a balance of probabilities and as such, successfully raised reasonable doubt to the prosecution's case.

E

[47] Consequently, this court had set aside the conviction and sentence by the sessions court and acquitted and discharged the accused of the charge preferred against him.

F *Convictions and sentence by sessions court set aside; and accused acquitted and discharged.*

Reported by Nabilah Syahida Abdullah Salleh

G

H

I